Supreme Court, U. S.
FILED
DEC 27 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-882

BILL P. COGDELL,

Petitioner,

v.

THE FORT WORTH NATIONAL BANK, Trustee,
Under the Will of D. M. COGDELL, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT OF TEXAS

GLORIA TANNER SVANAS
1813 East Eighth Street
Odessa, Texas 79761
Counsel for Petitioner

December, 1976

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In The

Supreme Court of the United States

OCTOBER TERM, 1976

No. ——

BILL P. COGDELL,

Petitioner,

v.

THE FORT WORTH NATIONAL BANK, Trustee,
Under the Will of D. M. COGDELL, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals
For the Eleventh Supreme Judicial District of Texas

OPINIONS BELOW

The Opinion of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas is reported at 536 SW2d 257. The Motion for Rehearing was denied on May 6, 1976. On

September 29, 1976, the Supreme Court of Texas dismissed Petitioner's Application for Writ of Error for Want of Jurisdiction, and Petitioner's Motion for Rehearing was overruled on October 27, 1976. There is no written Opinion by the Supreme Court of Texas.

JURISDICTION

The jurisdiction of this Court is invoked under *28 U.S.C. §1257(3).*

QUESTION PRESENTED

Whether a National Bank's sale of real property of a Trust to the Co-Executors prohibited by Texas Statutes constitutes a waiver of the venue privilege of *12 U.S.C. §94*?

STATUTES INVOLVED

12 U.S.C. § 94

12 U.S.C. §94. Venue of suits

Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases.
Title 12 U.S.C.A. Banks & Banking §§ 1 to 530, Page 442.

TEXAS PROBATE CODE

§352. Representative Not to Purchase Property of the Estate

The personal representative of an estate shall not become

the purchaser, directly or indirectly, of any property of the estate sold by him, or by any corepresentative if one be acting. If any such purchase is made, any person interested in the estate may file a written complaint with the court in which the proceedings are pending, and upon service of citation upon the representative, after hearing and proof, such sale shall be by the court declared void, and shall be set aside by the court and the property ordered to be reconveyed to the estate. All costs of the sale, protest, and suit, if found necessary, shall be adjudged against the representative.
Vol. 17B V.A.T.S. Probate Code, Page 214

STATEMENT OF THE CASE

Petitioner, Bill P. Cogdell (whose name has been legally changed from Marion P. Cogdell) filed suit in the 132nd Judicial District Court of Scurry County, Texas, (Tr. 1-8) for Declaratory Judgment to have declared void ab initio all leases, sales of all properties, real and personal, of the Estate of D. M. Cogdell, Deceased, to the Independent Co-Executors of the Estate of D. M. Cogdell, Deceased, prohibited by *§352* of the *Texas Probate Code*. The Fort Worth National Bank, Trustee, Co-Defendant, filed its Plea of Privilege claiming *12 U.S.C. §94* (Tr. 9) which was controverted by Petitioner (Tr. 13-16) claiming ten statutory exceptions established venue in Scurry County, Texas. Summary Judgment sustaining the Bank's Plea of Privilege was rendered on October 20, 1975. (Tr. 34-35)

In November, 1974, The Fort Worth National Bank, Trustee under the Last Will and Testament of D. M. Cogdell, Deceased, executed special Warranty Deeds (Tr. 6) conveying undivided interests in real property in Scurry County, Texas, from the trust

for the benefit of Marion P. Cogdell to the Independent Co-Executors of the Estate of D. M. Cogdell, Co-Defendants in the District Court.

The Eleventh Court of Civil Appeals erroneously held that since the Bank had already parted with title to the land that it was not a suit for recovery of land although the Deeds were void as a matter of law under §*352* of the *Texas Probate Code*. The Court of Civil Appeals affirmed the Summary Judgment sustaining the Plea of Privilege of The Fort Worth National Bank, Trustee. (Tr 46-47) 1-A After Motion for Rehearing was denied on May 6, 1976, Petitioner timely filed his Application for Writ of Error in the Supreme Court of Texas posing the question whether a National Bank can violate substantive laws of Texas and claim the protection of a Federal law granting preferential venue to National Banks. The Application for Writ of Error was dismissed for Want of Jurisdiction on September 29, 1976, and the Motion for Rehearing of the Application for Writ of Error was overruled on October 27, 1976. Petitioner has taken every requisite step under the *Texas Rules of Civil Procedure* to preserve the error of the Bank's Waiver of its venue privilege by the Bank's execution and delivery of the void Deeds.

REASONS FOR GRANTING THE WRIT

This case presents a clear example of Waiver by a National Bank in a local action. The Fort Worth National Bank, Trustee, by accepting appointment as Testamentary Trustee (Tr. 40-41) and dealing in its fiduciary capacity with assets of the Trust in the Estate of D. M. Cogdell, Deceased, in violation of §*352* of the *Texas Probate Code* waived venue privilege of *12 U.S.C. §94*, in an action filed in the County in which it conveyed undivided interests in real estate held as assets of a Trust to the Co-

Executors of the same Estate creating the Trust. (*Michigan National Bank v. Robertson, 372* US 591, 594 (1963). It is fundamental that a National Bank cannot violate the Statutes of Texas with impunity from venue outside the County of its principal place of business. The action against the Bank to declare its Deeds void as a matter of law constituted an action to recover real property which is a local action within the exception to *12 U.S.C. §94* carved out by *Casey v. Adams,* [102 US 66 (1880)].

It is uncontroverted that the Trustee-Bank as Grantor participated in the sales specified in the Petition for Declaratory Judgment. (Tr. 6) The Deed conveyed undivided interests of the Trusts in land in Scurry County, Texas, where jurisdiction is sought to be maintained against the Bank.

> "It is well established that the venue provisions of 12 U.C.S. 94 were enacted for the "convenience" of the banks and may be waived by the bank's conduct in a county where jurisdiction is sought to be maintained, whether such conduct occurred before or after the filing of the suit. *Reaves v. Bank of America,* 352 F.Supp. 745 (S.D. Cal. 1973).

Following the sales by the Trustee-Bank in November, 1974, the Trustee-Bank continued to use the Scurry County Court in Probate No. 2422: *In re: Estate of D. M. Cogdell, Deceased,* and continued to use the District Court of Scurry County, Texas, to enforce its claims as Testamentary Trustee under the Estate of D. Cogdell, Deceased, in Cause No. 9730 styled The Fort Worth National Bank, Trustee under the Will of D. M. Cogdell, Deceased, for the benefit of Marion P. Cogdell and for the benefit of Charlotte Cogdell Etgen, Plaintiffs, v. Jonisue Cogdell Stiff, David Martin Cogdell, Jr., and William Munsey Cogdell, Individually and as Independent Executors of the Estate of D. M. Cogdell, Marion P. Cogdell and Charlotte Cogdell Etgen,

Defendants. Indubitably, the Trustee-Bank knew the Grantees in the Warranty Deed were one and the same individuals as the Independent Co-Executors under the Last Will and Testament of D. M. Cogdell, Deceased, which also created the Testamentary Trust under which the Trustee-Bank claimed. In fact, the Trustee-Bank executed the special Warranty Deed to the individuals as Independent Co-Executors as part of the settlement in Cause No. 9730 in which David Martin Cogdell, Jr., and William Munsey Cogdell as Independent Co-Executors of the Estate of D. M. Cogdell, Deceased, had filed a Cross-Action against The Fort Worth National Bank, Individually and The Fort Worth National Bank, Trustee. The Trustee-Bank ratified the transaction by accepting the proceeds for the sales and crediting the proceeds to the Trusts. National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., _____ US _____, 48 L Ed 2nd 92, 92 S.Ct. _____(1976).

It is obvious that the enforcement against the Trustee-Bank of the proscription of §*352* of the *Texas Probate Code* will not interfere with the purpose of the National Bank, Respondent herein, nor will it tend to impair or destroy its efficiency as a Federal agency nor will it conflict with the paramount law of the United States. First National Bank in St. Louis v. State of Missouri, 263 US 640, 656 (1923); National Bank v. Commonwealth, 9 Wall. 353, 362[19 L Ed 701]; Davis v. Elmira Savings Bank, 161 US 275, 283; McClellan v. Chipman, 164 US 347, 357; Waite v. Dowley, 94 US 527, 533.

> "When a bank . . . commits tortious acts, by and through its agent, such as is alleged in this case, we hold that it has waived its privilege to the extent of being sued on the local transaction or activity involving the alleged tortious acts." Vann v. First National Bank in Little Rock, 324 So 2d 94, 95 D.Ct. Fla. App. (1976).

As a matter of law, a Judgment that the sales by The Fort Worth National Bank, Trustee, are void restores the title to the Trustee-Bank subject to the terms of the Testamentary Trust under the Last Will and Testament of D. M. Cogdell, Deceased, for the benefit of Marion P. Cogdell (Petitioner herein), and for the benefit of Charlotte Cogdell Etgen. Nevertheless, this is not a suit for construction of a Trust, and the Court of Civil Appeals' citations are inapposite. The conveyances by the Trustee-Bank consisted of undivided interests in real property in the Cogdell Center in Scurry County, Texas, held by the Trustee-Bank as Trust assets for the benefit of Petitioner under the Last Will and Testament of D. M. Cogdell, Deceased. It is the sales of these undivided interests in real properties that Petitioner seeks to cancel, rescind and have declared void ab initio. *Texas Probate Code §352.* The real property sold to Billy Cogdell and D. M. Cogdell, Jr., Grantees, was property located in Scurry County, Texas, and sold by the Trustee-Bank as Co-Representative to the Independent Co-Executors. William Munsey Cogdell (also known as Billy Cogdell) and David Martin Cogdell, Jr. (also known as D. M. Cogdell, Jr.) Co-Defendants in the District Court, who are the purchasers directly of the property of the Estate of D. M. Cogdell, Deceased, sold by the Trustee-Bank prohibited by §*352* of the *Texas Probate Code*. The proscription of the statute is clear and unambiguous and does not provide for any exceptions from its terms. 7-Up Bottling Co. of Austin, Inc. v. The Capital National Bank, 505 SW2d 624 (Austin Civil Appeals 1974, writ refused, no reversible error). The dual relationship of the purchasers and the dual relationship of the Seller in its fiduciary capacity under the Estate of D. M. Cogdell, Deceased, are controlling. The sole question is whether The Fort Worth

National Bank, Trustee, could sell real property acquired out of the Estate of D. M. Cogdell, Deceased, to the Co-Executors of the Estate of D. M. Cogdell, Deceased, in their capacity as individuals against the prohibition of *Texas Probate Code §352.*

The rule is that if the suit is founded upon any equitable title or right and requiring for its effectuation the removal of a legal impediment to Plaintiff's land, it is governed by *Article 1995(14) Vernon's Annotated Texas Statutes* as an exception to the venue statute and must be brought in the County where the land is situated. Landeau v. Investment Company, 358 SW2d 553 (Texas Supreme Court 1962); Renwar Oil Corporation v. Lancaster, 276 SW2d 774 (Texas Supreme Court 1955). On the basis of these authorities, it is perfectly clear that a suit by a *cestui que* trust to set aside and cancel deeds conveying his interest in the title to land in violation of *Probate Code §352* is properly regarded as a suit to remove an encumbrance or cloud upon the title to land and is within the mandatory exception to the venue statute and must be brought in the County where the land is situated, that is, Scurry County, Texas.

It is well settled that *12 U.S.C. §94* is not applicable to local *in rem* actions.

> "Local actions are in the nature of suits *in rem,* and are to be prosecuted where the same on which they are founded is situated." Casey v. Adams, 102 US 66, 68 (1880).

The discriminatory application of *12 U.S.C. §94* by the Eleventh Judicial District Court of Civil Appeals granting preferential venue to The Fort Worth National Bank, Trustee, is a denial of equal protection to Petitioner guaranteed by the Fourteenth Amendment to the United States Constitution and the equal protection principle embodied in the due process clause

of the Fifth Amendment to the United States Constitution. The decision by the Eastland Court of Civil Appeals holding that the Trustee-Bank had parted with title deprived Petitioner of his recourse statutorily specified by *Texas Probate Code §352.*

> ". . . any person interested in the Estate may file a written complaint with the Court in which the proceedings are pending, . . .".

Every citizen of Texas is subject to the exceptions *(Article 1995 Vernon's Annotated Texas Statutes)* to the statutory right to be sued in the County of his domicile—except National Banks in some Courts in Texas. It cannot be said that in all tribunals of Texas equal laws prevail. Cincinnati St. R. Co. v. Snell, 193 US 30, 37 (1904). The preferential venue privileges accorded National Banks by some Texas Courts undeniably over-burden the already congested dockets of metropolitan Courts. Furthermore, the National Bank as a co-conspirator and indispensable party co-defendant can effectively deprive the Court in which it is sued of jurisdiction over its joint tort-feasors or conspirators by claiming its preferential venue privilege as a National Bank. Casey v. Adams, 102 US 66 (1880). *12 U.SC. §94* as applied in Texas is grossly discriminatory in granting preferential venue to National Banks against the substantive real property rights of other citizens of Texas [Williams v. Illinois, 399 US 235 (1970); Griffin v. Illinois, 351 US 12, 17 n. 11 (1956)] and exceeds limits of constitutional due process clause of the Fifth Amendment offending traditional notions of fair play and substantial justice. ". . . this court has not . . . embraced the general proposition that a wrong may done if it can be undone." Stanley v. Illinois, 405 US 645, 647 (1972).

CONCLUSION

It is respectfully submitted that the Petition for Writ of Certiorari should issue and that this Court should vacate the Orders of the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas and remand the case to the District Court of Scurry County, Texas, for trial on the merits.

Respectfully submitted,

Gloria Tanner Svanas

GLORIA TANNER SVANAS
1813 East Eighth Street
Odessa, Texas 79761
Telephone: (915) 337-1568

Counsel For Petitioner

CERTIFICATE OF SERVICE

I, GLORIA TANNER SVANAS, a member of the Bar of the Supreme Court of the United States and the Attorney for BILL P. COGDELL, Appellant herein, hereby certify that on the 21 day of December 1976, I have mailed two (2) copies of the foregoing Petition for Writ of Certiorari to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas to opposing Counsel at the following address:

Mr. Robert M. Randolph
Law, Snakard, Brown and Gambill
2600 Fort Worth National Bank Building
Fort Worth, Texas, 76102; and

Mr. Marvin Champlin
Law, Snakard, Brown and Gambill
2600 Fort Worth National Bank Building
Fort Worth, Texas, 76102

Attorneys for The Fort Worth National Bank, Trustee.

I certify that all parties required to be served, have been served.

Gloria T. Svanas

Gloria T. Svanas

A-1

Bill P. Cogdell

Appellant

v.

The Fort Worth National Bank

Appellee

No. 4868—Appeal from Scurry County

Bill P. Cogdell filed suit against the Fort Worth National Bank, Trustee, and others for a declaratory judgment. The Bank's motion for summary judgment sustaining its plea of privilege was granted and Cogdell has appealed. We affirm.

The Bank's plea was controverted by citing ten exceptions under Article 1995, Texas Revised Civil Statutes.

The federal statute (12 USCA §94) on venue against national banking association is as follows:

§94. Venue of suits

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any State, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases . . ."

In Mercantile National Bank v. Langdeau, 371 U.S. 555, 83 S.Ct. 520 L.Ed.2d 523 (1963), the court said:

> "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national

banks subject to suit and we believe Congress intended that in those courts alone could a national bank be sued against its will.

We would not lightly conclude that a congressional enactment has no purpose or function. We must strive to give appropriate meaning to each of the provisions of Title 12 and its predecessors. See United States v. Menasche, 348 US 528, 539, 99 Led 615, 624, 75 S Ct 513; Montclair Twp. v. Ramsdell, 107 US 147, 152, 27 L ed 431, 432, 2 S Ct 391. Appellee, however, would have us hold that any state court could entertain a suit against a national bank as long as state jurisdictional and venue requirements were otherwise satisfied. Such a ruling, of course, would render altogether meaningless a congressional enactment permitting suits to be brought in the bank's home county. This we are unwilling to do, particularly in light of the history of §57 . . ."

Appellant contends the mandatory provision of Subdivision 14 of Article 1995, V.A.C.S. controls venue. "The pleadings concerning land in Scurry County are as follows:

"On November 12, 1974, The Fort Worth National Bank, Trustee, sold to Billy Cogdell and D. M. Cogdell, Jr., the real property interests held by The Fort Worth National Bank, Trustee, in the Cogdell Center properties in Scurry County, Texas, for a total consideration in excess of $10,000.00

Plaintiff alleges that the sale of an interest of real property held by Trustee as distributions from an Estate directly to the individuals serving as Executors of that Estate is proscribed by Section 352 of the Texas Probate Code."

Appellant's prayer for relief in part is as follows:

"WHEREFORE, Plaintiff prays that citation be issued to each of the Defendants named herein requiring them to answer and appear herein; and upon jury trial hereon that Plaintiff have judgment cancelling, rescinding, declaring void ab initio all leases, sales of all properties, real and personal, of the Estate of D. M. Cogdell, Deceased, to the

Independent Co-Executors and/or Trustee of the Estate of D. M. Cogdell, Deceased; . . ."

In Shellberg v. Shellberg, 428 S.W.2d 117 (Tex.Civ.App. Fort Worth 1968, writ dism'd), the court said:

"In Miller v. Howell, 234 S.W.2d 925 (Tex.Civ.App. 1950, no writ hist.), this court held: 'Plaintiffs say that their suit is one to recover land, and to partition land, and to foreclose a lien on land, a part of which land lies in Wood County. Their pleadings may contain conclusions to such effect, if the conclusions are read without regard to the remaining allegations in the pleadings, but when the pleadings are examined in their entirety, and when it is endeavored to find out what principal right or rights are asserted and what relief is sought, it is seen that the suit falls within a well-defined category. It is, by all standards, an equitable proceedings for a partnership accounting. It is a transitory action, rather than a local one, it is primarily a proceedings in personam, rather than a proceeding in rem.'

In the instant case when the pleadings are examined in their entirety and when it is endeavored to find out what principal right or rights are asserted and what relief is sought, we must conclude the trial court was correct in finding the suit was brought primarily to construe the written Trust Agreement, determine the rights and duties of the various trustees and beneficiaries, and to require an accounting from defendant as to his actions as a trustee.

The evidence, too, supports his findings.

The suit is primarily a proceeding in personam and not a proceeding in rem. Defendant was not entitled, therefore, to have the suit transferred to Moore County under the provisions of Sub. 14.

Venue was retained in Tarrant County under the provisions of Art. 7425b-24, Sections A and B, V.A.C.S."

Article 7525b-24(a) and (b) of Texas Trust Act provides:

"A. The district court shall have original jurisdiction to

construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, responsibilities, duties, and liability of trustee; the existence or non-existence of facts affecting the administration of the trust estate; to require accounting by trustee; and to surcharge trustee.

B. In cases where there be a single trustee, the venue of such actions shall be in the county of the residence of such trustee; or if a corporation, in the county of its principal place of business. Where there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained."

Article 1995, Subdivision 30, provides:

"30. Special venue—Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given.

We hold the record conclusively establishes the primary, dominant and ultimate purpose of this declaratory judgment suit is not to recover lands or remove encumbrances therefrom. Assuming this was a suit for the recovery of land, the above quoted portions of appellant's petition show the Bank parted with title before the commencement of this suit and under the holding in James v. Drye, 320 S.W.2d 319 (Tex. 1959) Subdivision 14 would not apply.

In James v. Drye, supra, the court said:

"This writ of error was granted because the holding of the Court of Civil Appeals that the suit was a suit for 'the recovery of lands' or 'damages to land' under Section 14, of Article 1995, Revised Civil Statutes, Vernon's Ann.Civ.St. art 1995, § 14, is in conflict with the holding of the Courts of Civil Appeals in the following cases: Smith v. Rampy, Tex.Civ.App. Amarillo, 1946, 198 S.W.2d 592; Morris Plan Bank of Fort Worth v. Ogden, Tex.Civ.App. Ft. Worth, 1940, 144 S.W.2d 998, and other similar cases. We approve

the holding of the earlier cases that suits against former owners of land who have parted with all title prior to the filing of suit are not suits for 'the recovery of lands', or 'damages to land' within the meaning of Section 14, Article 1995, Revised Civil Statutes, 1925 . . ."

We hold the summary judgment proof establishes as a matter of law there is no genuine issue of fact and the Bank is entitled to be sued in the county of its domicile as a matter of law under Article 7425 b-24 (a) and (b) and Subdivision 30 of Article 1995, T.R.C.S. and 12 USCA § 94.

We have considered all of Appellant's points and find no merit in them. They are overruled.

The judgment is affirmed.

ESCO WALTER
Associate Justice

April 15, 1976

IN THE SUPREME COURT OF TEXAS

September 29, 1976

No. B-6084
BILL P. COGDELL
vs.
THE FORT WORTH NATIONAL BANK
From Scurry County, Eleventh District.

Application of petitioner for writ of error to the Court of Civil Appeals for the Supreme Judicial District having been duly considered, it is ordered that the application be, and hereby is, dismissed for want of jurisdiction.

It is further ordered that applicant, Bill P. Cogdell, and surety, Merchants Mutual Bonding Company, pay all costs incurred on this application.

*****

October 27, 1976

No. B-6084
BILL P. COGDELL
vs.
THE FORT WORTH NATIONAL BANK
From Scurry County, Eleventh District.

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

* * * * *

I, GARSON R. JACKSON, Cleark of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the order of the Supreme Court of Texas in the

case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand the the seal of the Supreme Court of Texas, at the City of Austin, this, the Fifth day of November, 1976.

/s/ Garson R. Jackson
GARSON R. JACKSON, Clerk

By _____, Deputy.

NO. 11429

BILL P. COGDELL
V.
DAVID MARTIN COGDELL, JR., ET AL
IN THE DISTRICT COURT OF SCURRY COUNTY, TEXAS
132nd JUDICIAL DISTRICT
ORDER SUSTAINING PLEA OF PRIVILEGE

On the 9th day of October, 1975, came on to be heard the Motion for Summary Judgment of Defendant The Fort Worth National Bank, Trustee under the Will of D. M. Cogdell, Deceased, on its Plea of Privilege to the Petition of Plaintiff Bill P. Cogdell, and came the Plaintiff and said Defendant by their attorneys of record and announced ready; and the Court having read the pleadings and Affidavit on file and having heard the argument of counsel and considered all matters properly before the Court is of the opinion and finds that said Plea of Privilege should be sustained.

It is therefore ORDERED, ADJUDGED and DECREED that the Plea of Privilege of Defendant The Fort Worth National Bank, Trustee under the Will of D. M. Cogdell, Deceased, be sustained and that the cause of action alleged against said Defendant by Plaintiff in the suit styled and numbered hereinabove be transferred to the District Court of Tarrant County, Texas, the county of said Defendant's residence, office and place of business. It is further ORDERED, ADJUDGED and DECREED that the Clerk of this Court transmit to the Clerk of the District Court of Tarrant County, Texas, certified copies of the following instruments:

Petition for Declaratory Judgment.

Citation and Officer's Return of Citation served on Defendant The Fort Worth National Bank.

Plea of Privilege of The Fort Worth National Bank, Trustee under the Will of D. M. Cogdell, Deceased.

Controverting Plea to Plea of Privilege of The Fort Worth National Bank, Trustee.

Defendant's Motion for Summary Judgment on Plea of Privilege.

Affidavit of Bruce Petty in support of Motion for Summary Judgment on Plea of Privilege of The Fort Worth National Bank and Exhibit thereto.

Fiat setting hearing on Defendant's said Motion for Summary Judgment.

This Order granting Defendant's Motion for Summary Judgment on its Plea of Privilege.

It is further ORDERED, ADJUDGED and DECREED that all costs incurred in this Court in connection with his suit against said Defendant be taxed against Plaintiff Bill P. Cogdell.

To which order Plaintiff Bill P. Cogdell then and there objected and excepted in open court and gave notice of appeal to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas.

RENDERED AND SIGNED the 20th day of October, 1975.

Judge Presiding
/s/_____
Wayland G. Holt

NO. B-6084

IN THE SUPREME COURT OF TEXAS

BILL P. COGDELL,

Petitioner,

v.

THE FORT WORTH NATIONAL BANK, TRUSTEE,

Respondent

AMENDED NOTICE OF APPLICATION FOR WRIT OF CERTIORARI

NOTICE is hereby given that BILL P. COGDELL, Petitioner above named, hereby gives Notice of his Application for Writ of Certiorari to the Supreme Court of the United States from this Court's overruling of the Motion for Rehearing entered in this action on the 27th day of October, 1976, of the Dismissal of the Application for Writ of Error entered September 29, 1976, in Cause No. 4868 in the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland entered April 15, 1976, affirming the Order sustaining Plea of Privilege rendered October 20, 1975, in Cause No. 11,429 in the District Court of Scurry County, Texas, 132nd Judicial District.

This Application for Writ of Certiorari is taken pursuant to 28 *USC §1257 (3).*

DATED November 15, 1976

Respectfully submitted,

GLORIA T. SVANAS

1813 East Eighth Street
Odessa, Texas 79761
Telephone: (915) 337-1568

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT a true and correct copy of the foregoing Amended Application for Writ of Certiorari has this 14th day of November, 1976, been placed in the United States Mail, postage prepaid addressed to the following:

Mr. Robert M. Randolph and
Mr. Marvin Champlin
Law, Snakard, Brown and Gambill
2600 Fort Worth National Bank Building
Fort Worth, Texas, 76102
Certified Mail No. 696597
Return Receipt Requested
Attorneys for The Fort Worth National Bank, Trustee

Mrs. Oleta Moseley, Clerk
Court of Civil Appeals
Eleventh Supreme Judicial District
Eastland, Texas, 76448
Certified Mail No. 277857
Return Receipt Requested; and

Mrs. Bonnie Brooks
District Court Clerk
Scurry County Courthouse
Snyder, Texas, 79549
Certified Mail No. 277858
Return Receipt Requested

GLORIA T. SVANAS

IN THE COURT OF CIVIL APPEALS
FOR THE ELEVENTH SUPREME JUDICIAL DISTRICT
OF TEXAS
EASTLAND, TEXAS

NO. 4868

BILL P. COGDELL,

Appellant,

v.

THE FORT WORTH NATIONAL BANK, TRUSTEE,

Appellee

Request To Clerk To Certify And Transmit Entire Record

TO: (Mrs.) OLETA MOSELEY
Clerk of the Court of Civil Appeals
for the Eleventh Supreme Judicial District
of Texas, Eastland, Texas

Pursuant to the provisions of Rule 12(1) of the Rules of the Supreme Court of the United States, you are requested to certify and transmit to the Supreme Court of the United States the entire record of the proceedings herein.

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Bill P. Cogdell, Appellant

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY THAT a true and correct copy of the foregoing Request to Clerk to Certify and Transmit entire Record has this 22nd day of November, 1976, been placed in the United States Mail, postage prepaid, addressed to the following:

Mr. Robert M. Randolph and
Mr. Marvin Champlin
Law, Snakard, Brown and Gambill
2600 Fort Worth National Bank Building
Fort Worth, Texas, 76102

GLORIA T. SAVAS

Supreme Court, U. S.
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JAN 21 1977
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No. 76-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

BILL P. COGDELL, *Petitioner,*

v.

THE FORT WORTH NATIONAL BANK, TRUSTEE,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

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No. 76-882

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

BILL P. COGDELL, *Petitioner,*

v.

THE FORT WORTH NATIONAL BANK, TRUSTEE,
Respondent.

Brief in Opposition to Petition for Writ of Certiorari

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes The Fort Worth National Bank, Trustee under the Will of D. M. Cogdell, Deceased, for the benefit of Marion P. Cogdell ("Respondent"), and makes and files this its Brief in Opposition to Petition for Writ of Certiorari by Petitioner Bill P. Cogdell (being one and the same person as Marion P. Cogdell).

REPORTED OPINIONS

The only reported opinion of this case below is *Cogdell v. The Fort Worth National Bank*, 536 S.W.2d 257 (Tex. Civ. App. — Eastland 1976, writ dism'd w.o.j.). The opinion is reprinted as Appendix A, page A-1, of Petitioner's Petition.

JURISDICTION

Petitioner predicates jurisdiction on 28 U.S.C. §1257(3) (Supp. 1976). As hereinafter more fully stated in the Argument, Respondent objects to the jurisdiction of the Supreme Court to review this case on writ of certiorari on the grounds that the proceedings from which Petitioner appeals do not constitute a final judgment and that Petitioner wholly failed to timely raise any federal question in the Courts below.

STATUTES INVOLVED

In addition to the statutes set out in pages 2 and 3 of Petition for Writ of Certiorari, Respondent submits the following statutes are involved:

A. *Texas Revised Civil Statutes Annotated* article 1995, subdivision 30 (Vol. 5, pp. 70, 75, V.A.T.S.):

> "No person who is an inhabitant of this State shall be sued out of the county in which he has his domicile except in the following cases: . . .
>
> 30. Special venue. — Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given."

B. *Texas Revised Civil Statutes Annotated, Texas Probate Code* §3(aa) (Vol. 17A, p. 8, V.A.T.S.):

> "§3. Definitions and Use of Terms
>
> When used in this Code, unless otherwise apparent from the context: . . .
>
> (aa) 'Personal representative' or 'Representative' includes executor, independent executor, administrator, temporary administrator, guardian, and temporary guardian, together with their successors. The inclusion of independent executors herein shall not be held to subject such representatives to control of the courts in probate matters with respect to settlement of estates except as expressly provided by law."

C. *Texas Revised Civil Statutes Annotated, Texas Trust Act*, article 7425b, §24A&B (Vol. 20B, p. 240, V.A.T.S.):

> "Art. 7425b—24. Power of the court
>
> A. The district court shall have original jurisdiction to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, responsibilities, duties, and liability of trustee; the existence or non-existence of facts affecting the administration of the trust estate; to require accounting by trustee; and to surcharge trustee.
>
> B. In cases where there be a single trustee, the venue of such actions shall be in the county of the residence of such trustee; or if a corporation, in the county of its principal place of business. Where there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained."

QUESTIONS PRESENTED

Petitioner's statement, on page 2 of his Petition, of the issue in this proceeding implies a judgment has been rendered in which an act by Respondent has been held to be prohibited by Texas law. At best, Petitioner's statement *assumes* such act to be prohibited. However, no trial on the merits has been had in the cause below and no determination has been made as to whether such act was prohibited. The Petition arises out of an appeal from an interlocutory decision on venue.

STATEMENT OF THE CASE

This is a venue case. Respondent is Trustee of a testamentary trust created in the Will of D. M. Cogdell, Deceased, for the benefit of Respondent. The Independent Co-Executors of such Will are David Martin Cogdell, Jr., William Munsey Cogdell, and Jonisue Cogdell Bowden Stiff.

On July 31, 1975, Petitioner filed, in Scurry County, Texas, his Petition for Declaratory Judgment naming Respondent and such Co-Executors as defendants and "demanding Declaratory Judgment that each of the transactions hereinafter specified is null and void ab initio as acts of Co-Executors in leasing and/or purchasing directly or indirectly property of the Estate of D. M. Cogdell, Deceased, sold and/or leased by them as the Executors as proscribed by *Section 352 of the Texas Probate Code*" (R. 1, Par. II) (Emphasis in original). This is the gravamen of the suit. The Petition states, "THE FORT WORTH NATIONAL

BANK, TRUSTEE, is joined as a Trustee under the Estate of D. M. Cogdell, Deceased, having participated in the void sales . . ." (R. 1, Par. I). Basically, Petitioner alleged that various transactions (including a partial distribution from the Estate in the form of a distribution of stock made on the distributee's agreement to assume an equal amount of indebtedness owed by the Estate) whereby the Respondent sold property to the Co-Executors of the Estate in their individual capacities violated provisions of the Texas Probate Code. No collusion is alleged by Petitioner.

The allegations of such Petition for Declaratory Judgment concerning acts of Respondent are summarized as follows:

(1) *Paragraph V(B):* That Respondent sold shares of stock held in trust to the Co-Executors of the Estate, in their individual capacities, and that this violated section 352 of the Texas Probate Code;

(2) *Paragraph VI(A):* That Respondent purchased shares of stock of The Fort Worth National Bank from the Estate by assuming an indebtedness of the Estate in an amount equal to the value of such stock and that, since Respondent was a personal representative of such Estate, such transaction violated section 352 of the Texas Probate Code;

(3) *Paragraph VI(B):* That Respondent has exchanged Fort Worth National Bank stock held in trust for stock of Texas American Bancshares Inc. and that this violated section 352 of the Texas Probate Code since it was "a sale/purchase by a representative";

(4) *Paragraph VII:* That Respondent sold stock held in trust to the Co-Executors of the Estate, in their individual capacities, and that this violated section 352 of the Texas Probate Code;

(5) *Paragraph VIII:* That Respondent sold real property interests in Scurry County held in trust to the Co-Executors of the Estate, in their individual capacities, and that this violated section 352 of the Texas Probate Code;

(6) *Paragraph IX:* That Respondent sold trust personal property to the Co-Executors of the Estate, in their individual capacities, and that this violated section 352 of the Texas Probate Code;

Petitioner, in Paragraph XI of his Petition, asked for damages.

On August 14, 1975, Respondent filed its Plea of Privilege to be sued in Tarrant County, Texas, pursuant to 12 U.S.C. §94 and Texas Revised Civil Statutes Annotated, Texas Trust Act, article 7425b, §24 (R. 9).

On September 2, 1975, Petitioner filed his Controverting Plea (R. 13) alleging exceptions to venue under Texas Revised Civil Statutes Annotated, article 1995, subdivisions 4, 5, 6, 7, 9, 10, 11, 14, 18, and 29a.

Respondent filed its Motion for Summary Judgment on Plea of Privilege (R. 27) and Affidavit in support of such Motion (R. 40). The Trial Court heard Respondent's Motion by oral argument on October 9, 1975, and granted such Motion by Summary Judgment rendered and signed on October 20, 1975, transferring the action to the District Court of Tarrant County, Texas. (R. ....., A. to Petition, pp. A-8, A-9). Texas law allows an appeal from an interlocutory order overruling or granting a plea of privilege. *Tex. Rev. Civ. Stat. Ann.* art. 2008.

Petitioner raised the question of waiver of the venue privilege of 12 U.S.C. §94 for the first time on appeal to the Eastland Court of Civil Appeals. This allegation was not raised in Petitioner's pleadings before the Trial Court, and Respondent pointed this out to the Court of Civil Appeals.

On April 15, 1976, the Eastland Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas affirmed the decision of the Trial Court, holding that the summary judgment proof established as a matter of law that there was no genuine issue of fact as to venue; that the record conclusively established that the primary, dominant and ultimate purpose of Petitioner's action was not to recover lands or remove encumbrances therefrom; and that Respondent was entitled to be sued in the county of its domicile as a matter of law under article 7425b, §§24A and B of the Texas Trust Act, subdivision 30 of article 1995, and 12 U.S.C. §94 (R. .....; A. to Petition, pp. A-1 through A-5). Petitioner, at page 4 of his Petition for Writ of Certiorari, implies that the Court of Civil Appeals held the transactions complained of by him "void as a matter of law under *§352 of the Texas Probate Code.*" (Emphasis in original). Petitioner repeats the implication in the first sentence of page 7 of the Petition. Of course, there was no such

holding by the Court of Civil Appeals. There has been no trial on the merits, and, as hereinafter shown, there is no merit in Petitioner's claim that the transactions were void as a matter of law.

Petitioner then filed his Motion for Rehearing (R. ——), again asserting the question of waiver of the venue privilege of 12 U.S.C. §94 (Assignments of Error I, II, III, IV) and raising, for the first time, the constitutionality of 12 U.S.C. §94 as a violation of equal protection (presumably under section 1 of the Fourteenth Amendment to the United States Constitution) (Assignment of Error XX). The Motion for Rehearing was denied May 6, 1976.

Petitioner then made application to the Supreme Court of Texas for a writ of error, for the first time asserting that Respondent, by accepting its responsibilities as Trustee, acted under "color of State law" under 42 U.S.C. §1983 and for the first time raising the due process clause of the Fifth Amendment. Petitioner predicated jurisdiction of the Texas Supreme Court on Texas Revised Civil Statutes Annotated, aricle 1728, subdivisions 2, 3 and 6. Since a judgment of the Court of Civil Appeals affirming or reversing an order sustaining plea of privilege is conclusive on the law and the facts, the Texas Supreme Court ordinarily has no jurisdiction on the law and the facts, the Texas Supreme Court ordinarily has no jurisdiction to grant a writ of error from such judgment. *Tex. Rev. Civ. Stat. Ann.* art. 1821, subd. 5, and art. 1728, subd. 6. A writ of error to the Texas Supreme Court to review a plea of privilege decision is available only when there is a dissent in the Court of Civil Appeals upon a question of law material to the decision or when the Court of Civil Appeals holds differently from a prior decision of another Court of Civil Appeals or of the Texas Supreme Court upon a question of law material to the decision of the case. *Id.* arts. 1821, subd. 5, and 1728, subd. 1, 2 and 6; *John Farrell Lumber Co. v. Wood*, 400 S.W.2d 307 (Tex. Sup. 1966); *International Harvester Co. v. Stedman*, 324 S.W.2d 543 (Tex. Sup. 1959); *State v. Wynn*, 301 S.W.2d 76 (Tex. Sup. 1957); *Magouirk v. Williams*, 249 S.W. 185 (Tex. Comm'n App. 1923, writ dism'd as recommended).

There was no dissent in the Eastland Court of Civil Appeals. Therefore, jurisdiction of the Texas Supreme Court depended upon a conflict of decisions under subdivision 2 of article 1728. A conflict which will invoke jurisdiction under this statute does not exist unless the rulings are so precisely upon the same facts that one decision would operate to overrule the other if both cases were decided by the same Court. *John Farrell Lumber Co. v. Wood, supra; International Harvester Co. v. Stedman, supra; State v. Wynn, supra; Garitty v. Rainey*, 247 S.W. 825 (Tex. Sup. 1923). "When a conflict of decisions is made the basis of Supreme Court jurisdiction it is essential that such conflict appear on the face of the opinions themselves and that the same be specifically pointed out in the Application for Writ of Error." *State v. Wynn, supra*, 301 S.W.2d at 79.

No such conflicts existed and the Texas Supreme

Court dismissed the application for writ of error on September 29, 1976, for want of jurisdiction. Petitioner then filed his Motion for Rehearing asserting, as a basis for jurisdiction in connection with his argument concerning the construction of §352 of the Texas Probate Code, that "State's Rights compel the jurisdiction of this Court against the unconstitutional encroachment by Federal venue statutes." (R. ..... ; Motion for Rehearing, p. 9). The Motion for Rehearing was overruled on October 27, 1976.

ARGUMENT AGAINST GRANTING CERTIORARI

A. Summary of Argument. The Petition for writ of certiorari should be denied for the following reasons. First, no substantial federal question is presented. Petitioner's complaint goes only to Texas law and includes a complaint that the Court of Civil Appeals erroneously construed a Texas statute. Second, the decision of the Court of Civil Appeals is based on independent federal and nonfederal grounds, either of which would fully support the decision. Third, there is a serious question of the finality of the decision of which Petitioner seeks review since the decision was rendered with regard to the question of venue only. Fourth, Petitioner failed to raise any federal question in a timely and proper manner so as to preserve such question for review. Fifth, the decision of the Court of Civil Appeals was correct both as to the facts and as to controlling federal and state law.

B. No Substantial Federal Question. Petitioner does not present any substantial federal question for review. At bottom, he has but one complaint which he seeks to cast in a constitutional mold: that the Court of Civil Appeals held that Petitioner's action, ostensibly under §352 of the Texas Probate Code, was not *primarily* to recover title to land under Texas law and, hence, that 12 U.S.C. §94 and the Texas Trust Act, article 7425b, §§24A and B, controlled venue. Petitioner says such holding is discriminatory and that Respondent waived the federal venue privilege.

A finding that Respondent did not waive the venue privilege of 12 U.S.C. §94 is not necessary to the decision of the Court of Civil Appeals, and a finding of such waiver would not disturb it. The reason is that the decision with regard to venue of Petitioner's action rests independently on federal grounds (12 U.S.C. §94) and on state grounds (Texas Trust Act, art. 7425b, §24). It is fundamental that the Supreme Court will decline to review a state court judgment which rests on independent and adequate state substantive grounds. *Henry v. Mississippi*, 379 U.S. 443, 446, 85 S.Ct. 493, ..., 13 L.Ed.2d 439, 441 (1965).

Furthermore, throughout the Petition for writ of certiorari is the transparent assertion that the Texas courts erroneously construed Texas Probate Code §352 by not accepting Petitioner's arguments that pleading such statute makes the alleged transaction automatically void so that there must have been a waiver of the venue privilege by Respondent. Besides not being raised in the Trial Court, such a question of state statutory construction is not a federal question for review.

C. No Final Judgment. There is a serious question of the finality of the state court proceedings within the meaning of 28 U.S.C. §1257. As stated, this is a venue case. Texas law allows appeal from an interlocutory order granting or overruling a plea of privilege directed to the venue of a suit or proceeding. *See Tex. R. Civ. P.* 86-89; *Tex. Rev. Civ. Stat. Ann.* art. 2008. There has been no judgment on the merits disposing of all issues and parties. Only the interlocutory venue question has been determined. Petitioner would not be irreparably harmed if the venue question is not reviewed. *See Republic Natural Gas Co. v. Oklahoma*, 334 U.S. 62, 68 S.Ct. 972, 92 L.Ed 1212 (1947). Petitioner is a resident of Midland County, Texas. Petitioner is currently involved in a separate action for breach of trust against Respondent in the 17th District Court of Tarrant County, Texas. This separate lawsuit was originally filed by Respondent as a Cross-Action in Scurry County, Texas, but was transferred to Tarrant County at Petitioner's demand after Respondent filed a Plea of Privilege.

Unlike other Supreme Court cases dealing with an interlocutory venue decision or the question of waiver, this case does not involve a ruling by the highest state court that the venue of a suit against a national bank is controlled by state law rather than federal law. *See Mercantile Nat'l Bank v. Langdeau*, 371 U.S.555, 83 S.Ct. 520, 9 L.Ed.2d 523 (1963); *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc.*, ... U.S. ....., 96 S.Ct. ....., 48 L.Ed.2d 92 (1976). Thus, the question of which conflicting statute governs is not present here as "a separate and

independent matter, anterior to the merits and not enmeshed in the factual and legal issues comprising the [Petitioner's] cause of action." *Mercantile Nat'l Bank v. Langeau, supra*, 371 U.S. at 558, 9 L.Ed.2d at 526. Nor is this a case where the state court failed to consider the question of waiver. *National Bank of North America v. Associates of Obstetrics and Female Surgery, Inc., supra.* Despite the fact that Petitioner failed to plead waiver or present summary judgment evidence in the Trial Court which would constitute a material question of fact in that regard, Petitioner fully briefed and argued the question in the Court of Civil Appeals.

D. Waiver of Constitutional Point in State Courts. As heretofore stated under "Statement of the Case," Petitioner waived his right to assign the question of the constitutionality of the application of 12 U.S.C. §94 as error before the Court of Civil Appeals or Texas Supreme Court by not raising the point either in the Trial Court by appropriate pleading or before the Court of Civil Appeals by appropriate point of error. *Edwards v. Strong*, 213 S.W.2d 979 (Tex. Sup. 1948); *City of Deer Park v. State*, 275 S.W.2d 77 (Tex. Sup. 1954). Respondent, by filing its Plea of Privilege, established a prima facie case for change of venue. It then became necessary for Petitioner to file its Controverting Plea setting out specifically the venue facts relied on to come within a particular exception and to sustain the burden of proof that its cause came within one or more of such exceptions. *Berry v. Pierce Pet. Corp.*, 39 S.W.2d 824 (Tex. Sup. 1931); *Sanderlin v. Dransfield*, 523 S.W.2d 794 (Tex.

Civ. App.— Fort Worth 1975, no writ). *See also First Nat'l Bank v. Texas Foundries, Inc.*, 512 S.W.2d 690 (Tex. Civ. App. — Beaumont 1974, no writ).

The Plea of Privilege and the controverting Plea outlined the issues as to the venue exceptions. Respondent's sworn Plea of Privilege (R. 9) alleged the following:

(1) That Respondent was not a resident of Scurry County, Texas, at the time of institution of the suit, at the time of service of process on it, or at the time of filing the plea, nor did it have an office or place of business in such County;

(2) That, at all such times, Respondent's residence, office and place of business was in Tarrant County, Texas, that its post office address was 500 Throckmorton Street, Fort Worth, Texas and that the post office address of its attorneys was 2600 Fort Worth National Bank Building, Fort Worth, Texas;

(3) That no exception to exclusive venue in Tarrant County, Texas, exists;

(4) That Respondent is a national banking association with its principal and only place of business in Fort Worth, Tarrant County, Texas, and that venue is mandatory at such place pursuant to 12 U.S.C. §94; and

(5) That Respondent is the sole Trustee of the Trust created under the Will of D. M. Cogdell, that the Trustee has its principal place of business in Tarrant County, Texas, and that exclusive venue lies in Tarrant County, Texas, pursuant to the Texas Trust Act, article 7425b, §24B.

Petitioner's Controverting Plea (R. 13) averred various exceptions to venue under the general Texas venue statute upon which Petitioner placed full reliance. These were subdivisions 4, 5, 6, 7, 9, 10, 11, 14, 18 and 29a of article 1995. No issue of waiver of 12 U.S.C. §94 was raised in this pleading.

The Affidavit of Bruce Petty (R. 40) in support of Respondent's Motion for Summary Judgment (R. 27) as a matter of law under 12 U.S.C. §94 and the Texas Trust Act, article 7425b, §24, was made on personal knowledge and recited that:

(1) The Fort Worth National Bank is a national banking association, having its principal office and place of business in Fort Worth, Tarrant County, Texas;

(2) The Fort Worth National Bank was chartered as a national banking association on March 4, 1884, by Charter No. 3131;

(3) On July 31, 1975 and at all times thereafter, the residence, office, and place of business of The Fort Worth National Bank was located at 500 Throckmorton Street, Fort Worth, Tarrant County, Texas, and, at all such times, The Fort Worth National Bank did not have an office or place of business in Scurry County, Texas;

(4) The Fort Worth National Bank is the sole Trustee under the Will of D. M. Cogdell, and that, at all times mentioned above, the residence, office, and principal place of business of such Trustee was at 500 Throckmorton Street, Fort Worth, Tarrant County, Texas.

An original Certificate of the Comptroller of the Cur-

rency, Department of the Treasury of the United States of America, certifying to the charter of The Fort Worth National Bank as a national banking association was attached to such Affidavit and incorported therein. A copy was substituted on request and agreement of counsel. Petitioner did not present any affidavit or other evidence opposing the Motion for Summary Judgment.

Except for jurisdictional questions, a point may not be raised for the first time on the motion for rehearing in the Court of Civil Appeals, as the Petitioner did, for review in the Texas Supreme Court unless the error alleged is the kind "that directly and adversely affects the interests of the public generally" so as to be regarded as fundamental. *Ramsey v. Dunlop*, 205 S.W.2d 979 (Tex. Sup. 1947); 4 *Tex.Jur.2d (Rev.) Appeal & Error — Civil Cases* §674. Such a point is subject to review though not originally assigned as error. *Id.* Petitioner did not contend in the Texas Supreme Court that the national bank venue statute so affects the public generally as to qualify for the exception.

Even if the point had not been waived by Petitioner, none of the cases which have dealt with 12 U.S.C. §94 has ever doubted the statute's constitutionality. *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc.*, 480 F.2d 798, 800 (5th Cir. 1973). The statute is "unquestionably" within congressional authority to prescribe the manner under which the national banks could sue or be sued, *Mercantile National Bank v. Langdeau, supra*, 371 U.S. at 558, 83 S.Ct. at 524,

9 L.Ed.2d at 527, and the statute has been held not to be unreasonable, arbitrary, or discriminatory. *Northside Iron & Metal Co., Inc. v. Dobson & Johnson, Inc., supra.* The authority is in such accord that "the venue provision for national banks has been determined *beyond doubt* to be constitutional." *Brown v. Bank of America National Trust & Savings Association*, 281 F.Supp. 82, 84 (N.D. Ill. 1968) (Emphasis added).

E. Decision Below Correct on Law and Undisputed Facts. Article 1995, subdivision 30, of the Texas Revised Civil Statutes Annotated, provides:

> "Special venue. — Whenever in any law authorizing or regulating any particular character of action, the venue is expressly prescribed, the suit shall be commenced in the county to which jurisdiction may be so expressly given."

One such special venue provision applicable to Petitioner's suit appears in the Texas Trust Act, article 7425b, §241. Another special venue statute, arising under federal law pertaining to national banks and controlling all state law, is that found in 12 U.S.C. §94. Both were relied upon by Respondent in its Plea of Privilege and its Motion for Summary Judgment. Both were relied upon by the Court of Civil Appeals in its decision, and both offer independent and adequate grounds for that decision.

1. Mandatory Venue of Suits Against National Banking Associations Was Not Waived By Respondent.

a. Analysis of the Federal Statute. The federal

statute providing for venue of suits against a national banking association (12 U.S.C. §94) provides as follows:

> "Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be established, or in any state, county, or municipal court in the county or city in which said association is located having jurisdiction in similar cases."

This section is mandatory. A national bank cannot be sued without its consent in a state court outside the county or city in which it is located. *Mercantile Nat'l Bank v. Landeau, supra.*

In *Van Reed v. People's Nat'l Bank*, 198 U.S. 554, 557, 25 S.Ct. 775, 49 L.Ed. 1161, 1162 (1905), the Supreme Court of the United States said:

> "The right of Congress to determine to what extent a state court shall be permitted to entertain actions against national banks, and how far these institutions shall be subject to state control, is undeniable. National Banks are quasi-public institutions, and for the purpose for which they are instituted are national in their character, and, within constitutional limits, are subject to the control of Congress and are not to be interfered with by state legislative or judicial action, except so far as the law-making power of the government may permit."

A national bank is "established" or "located" within the meaning of the statute only at the national bank-

ing association's principal place of business as set forth in its charter certificate. *Buffum v. Chase Nat'l Bank*, 192 F.2d 58 (7th Cir.), *cert. denied*, 342 U.S. 944, 72 S.Ct. 558, 96 L.Ed. 702 (1951); *United States Nat'l Bank v. Hill*, 434 F.2d 1019 (9th Cir. 1970). The place of business set forth in the charter certificate of The Fort Worth National Bank is Fort Worth, Tarrant County, Texas.

Furthermore, the provisions of 12 U.S.C. §94 apply even though the national bank involved is exercising fiduciary powers rather than traditional banking powers. *Kader v. First Nat'l Bank of Fort Meyers*, 387 F. Supp. 535 (D. Pa. 1975) (action against bank as executor for breach of contract or promise of decedent to devise or bequeath certain property).

b. Waiver. As shown above, Petitioner did not, in either the Trial Court or in the Court of Civil Appeals, in any manner contest the facts that Respondent is a national banking association with its principal and only place of business in Tarrant County, Texas.

Instead, at page 12 his Brief in the Court of Civil Appeals, Petitioner said:

> "THE QUESTION PRESENTED IS whether a National Bank can violate the substantive laws of Texas and claim the protection of a federal law granting preferential venue to National Banks,"

This is the essence of Petitioner's statement of the question involved in this Court. Petitioner sets out various theories by which he alleges Respondent "waived" venue in the county of its principal place of business

as set out in its charter. The allegations of waiver briefed by Petitioner here, in the Texas Supreme Court, and in the Court of Civil Appeals were not raised by any pleadings in the Trial Court. Furthermore, as a matter of law, there was no waiver of the venue privilege.

First of all, what Texas laws, claimed to have been violated, are involved? Texas Probate Code §352, assumed by Petitioner to have been violated, involves acts by "the personal representative." Respondent is not a personal representative under Texas law; it is a Trustee. The term "personal representative" is defined in the Probate Code as meaning an "executor, independent executor, administrator, temporary administrator, guardian, and temporary guardian, together with their successors." *Tex. Prob. C.* §3(aa). In addition, it is evident on the face of Petitioner's pleadings that no "*personal representative*" became the "*purchaser*" of any "*property of the estate*" "*sold by him or by any co-representative*" within the proscription of §352. Any sale was of trust assets and was by the Trustee to the Executors in their individual capacities. Further, no collusion, fraudulent or otherwise, between Respondent and the Co-Executors of the Estate of D. M. Cogdell was alleged by Petitioner.

Second, the authorities cited by Petitioner concerning waiver of venue of suits against national banks are minority decisions, are not in accord with the decisions of this Court, are not in support of Petitioner's proposition and are not applicable to the facts of this case. The quote found on page 5 of Petitioner's Petition is from *Texas Commerce Bank Nat'l. Ass'n. v. Tripp*, 516 S.W.2d 256, 258 (Tex. Civ. App. — Fort Worth 1974, writ granted, judgments of Courts below set aside, and causes dismissed as moot without decision on the merits, 18 *Tex. Sup. Ct. J.* 278). Besides being of no value as precedent because of the treatment on appeal, the strict holding of the Court of Civil Appeals in the *Tripp* case was that the bank waived venue under 12 U.S.C. §94 by personally invoking the Sheriff's services as an officer of the Court in Wise County, Texas, to serve process in that county and by acting willfully and with knowledge that the pre-judgment garnishment served on the Wise County bank was wrongful as a matter of law. *Id.* at 258, 259. *But see First Nat'l Bank v. Stoutco, Inc.*, 530 S.W.2d 619 (Tex. Civ. App.—San Antonio 1975, writ dism'd) (no waiver in similar situation). The Court in the *Tripp* case said, at 258, with regard to *Reaves v. Bank of America*, 352 F. Supp. 745 (D. Cal. 1973):

> "In discussing the applicable cases the court pointed out what they '. . . involved situations where the banks had either utilized the local state courts as plaintiffs or had resorted to local law for self-help repossession statutes.'"

In *Reaves v. Bank of America, supra*, Plaintiff purchased an automobile by financing it through one of Defendant bank's located in the district where Plaintiff sued. The bank repossessed the automobile pursuant to, and in reliance on, self-help provisions of the California Commercial Code. Plaintiff sued for damages for wrongful repossession on the ground that such self-help provisions were unconstitutional. The

bank, relying on 12 U.S.C. §94 moved to dismiss or to transfer the case to the Northern District of California for lack of proper venue. The District Court stated the issue before it on such motion:

> "The question raised by defendants' motion to dismiss or to transfer this case for improper venue involves an issue of first impression for this District Court and for this Circuit: what activities by a nationally chartered bank are sufficient to constitute a waiver of venue under 12 U.S.C. §94, so that the bank may be sued in a district other than where it is established."

Id. at 746.

The Court relied on earlier statements concerning waiver generally with reference to national banks:

> " 'Waiver is a voluntary and intentional relinquishment or abandonment of a known existing right or privilege, which, except for such waiver, would have been enjoyed. 67 C.J. 289. It may be expressed formally or it may be implied as a necessary consequence of the waiver's conduct inconsistent with an assertion of retention of the right. It must be proved by the party relying upon it. And if the only proof of intention to waive rests on what a party does or forbears to do, his act or omissions to act should be so manifestly consistent with and indicative of an intent to relinquish voluntarily a particular right that no other reasonable explanation of his conduct is possible.' "

Id. at 748, quoting *Buffum v. Chase Nat'l Bank, supra.*

After reviewing the activities of the bank within the Southern District of California, the Court denied the bank's motion on the ground it had waived venue. The factors involved in this decision were: (1) the bank had 66 branches in the Southern District and through them carried on extensive banking activities; (2) the promissory note and security agreement were executed in the Southern District; (3) the bank relied on state law in effect in the Southern District in repossessing the automobile there; and (4) from August, 1964 to November 30, 1972, the bank had sued as plaintiff 105 times and had been sued 338 times in the San Diego County Superior Court alone, but the bank had never raised a venue objection. This latter point was the primary basis of the Court's statement that such conduct raises a "strong inference of the relinquishment of a known right." *Id.* 749-750.

Petitioner says that, Respondent "continued to use the Scurry County Court in Probate Number 2422 *In re: Estate of D. M. Cogdell, Deceased,* and continued to use the District Court of Scurry County, Texas to enforce its claims as Testamentary Trustee under the Estate of D. M. Cogdell, Deceased, in Cause No. 9730 . . ." (Petition 5). Petitioner also says the conveyances complained of were done pursuant to settlement of Cause No. 9730, in the District Court of Scurry County. (Petitioner does not state that the settlement was pursuant to a judgment approving the settlement after hearing.) Thus, according to Petitioner, Respondent "waived" its venue privilege found in

12 U.S.C. §94, and Petitioner cites the *Reaves* case, *supra*, as authority. This argument is not valid.

First, the original suit by Respondent as Trustee in Cause No. 9730 was against the Co-Executors for construction of the Will of D. M. Cogdell probated in Scurry County, Texas, and to compel an accounting and delivery of Estate assets to the Trust. Certainly, a waiver of a known right cannot be inferred from one performing the duties imposed on it as Trustee. Second, by July 31, 1975, the date of Petitioner's separate action, all litigation in Scurry County between Petitioner and Respondent was final and complete. The judgment in Cause No. 9730-A (which was severed from No. 9730 and involved a court-approved settlement in that case between Respondent and the majority of the Executors) was final; Petitioner's attempted appeal from the severed portion of the litigation was dismissed on July 3, 1975, by the Eastland Court of Civil Appeals as being from No. 9730 in which no appealable judgment was rendered; and, as heretofore stated, Petitioner's Cross-Action against Respondent in No. 9730 had been transferred to Tarrant County, Texas, in May, 1974, by order sustaining Respondent's Plea of Privilege in that case (after withdrawal of Petitioner's Controverting Plea and upon Petitioner's own demand). Third, Petitioner has alleged no further facts as to Respondent's "participation" in the probate matter nor does he cite any authority for his apparent proposition that, by accepting appointment as testamentary trustee, Respondent subjected itself to the jurisdiction of the courts in the county where the Will was probated. Petitioner raised

this argument for the first time in the Texas Supreme Court on application for writ of error. To so hold would be in contradiction to the practical realities of the administration of trusts, the venue provisions of federal law and especially the Texas Trust Act. *See Tex. Rev. Civ. Stat. Ann.* art. 7425b, §24. Assets were delivered to the Respondent as Trustee in Tarrant County, Texas, for administration there; but no facts are alleged or shown in the record as to participation in the probate proceedings by the Respondent, and in fact Respondent did not participate in the probate proceedings.

Finally, and most important, as a matter of law, even if there was *other* litigation pending in Scurry County involving Respondent, this would not constitute a waiver of the venue privilege in Petitioner's *separately filed* action. The cases cited by Petitioner (including the *Reaves* case) extend the concept of "consent" to or "waiver" of venue far beyond the facts and reasoning of the cases which announced the concept; indeed, the cases cited by Petitioner are in derogation of the mandatory venue prescribed by the federal statute. It is true that the federal venue statute was enacted for the convenience of the national banks "to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process from state court" and as such is a personal privilege which can be waived by the bank and "which it could claim or not as it deemed necessary." *First Nat'l Bank v. Morgan*, 132 U.S. 141, 144-145, 10 S.Ct. 37, 38, 33 L.Ed. 282, 284 (1889).

Thus, *Morgan* presents the first type of waiver: failure to claim the privilege at the trial in state court.

The second type of waiver results from the bank's filing suit in a state court located in a district or county other than that of its principal place of business. In such a case, the bank submits itself to the jurisdiction of that Court "as to all matters *arising out of or incidental to the subject matter of the suit* . . ." *Zachry v. Robertson*, 214 S.W.2d 949 (Tex. Sup. 1948) (Emphasis added), quoted in *The Fort Worth Nat'l Bank v. Stiff*, 482 S.W.2d 337, 338 (Tex. Civ. App. — Eastland 1972, writ ref'd n.r.e.), *cert. denied*, 410 U.S. 932. In the latter case, however, the bank's waiver was held to result from its filing in Scurry County *the same suit* in which it was itself sued by cross-action, as to which cross-action the plea of privilege was filed.

The third type of waiver is similar to the second but is more express. It would be illustrated by instances where stipulations or agreements are involved; or where, to qualify to do business in another state for a limited business purpose, the bank must agree with the state to submit itself to the jurisdiction of that state's courts in suit against it arising out of the limited business done. *Buffum v. Chase Nat'l Bank, supra.*

Present in all these types of waiver of venue is either the formal expression of waiver, or the implication of waiver as a *necessary* consequence of the bank's conduct inconsistent with an assertion of retention of the right and indicative of an intent to reliquish the right voluntarily. *Id.*

This is the only concept of waiver which can be found in the decisions of the United States Supreme Court. Such concept is the equivalent of express or implied consent. To conclude otherwise would be to "conclude that a congressional enactment has no purpose or function." *Mercantile Nat'l Bank v. Langdeau, supra*, 371 U.S. at 560, 9 L.Ed.2d at 527.

> "The phrase 'suits . . . may be had' was, in every respect, appropriate language for the purpose of specifying the precise courts in which Congress consented to have national banks subject to suit and we believe Congress intended that in those Courts alone could a national bank be sued against its will."

Id. See also First Nat'l Bank v. Stoutco, Inc., supra, 530 S.W.2d at 621-622.

Thus, the Courts, including the Fifth Circuit, have not extended the concept of waiver beyond the limited scope perceived by the Supreme Court to have been given it by Congress. Acting as an indentured trustee, exercising fiduciary powers, violation of securities laws, owning branch banks or subsidiaries, or committing a tort in a juridiction other than that in which the bank is located does not amount to such a waiver. *See Romè v. Eltra Corp.*, 297 F. Supp. 314 (D. Pa. 1969); *Kader v. First Nat'l Bank, supra; Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co.*, 394 F.2d 300 (2d Cir. 1968); *General Elec. Cred. Corp. v. James Talcott, Inc.*, 271 F. Supp. 699 (D. N.Y. 1966); *United States Nat'l Bank v. Hill, supra; Helco, Inc. v. First Nat'l City Bank*, 470 F.2d 883

(3rd Cir. 1972); *Northside Iron & Metal Co., Inc. v. Dobson and Johnson, Inc.*, 480 F.2d 798 (5th Cir. 1973). *See also Annot.*, 1 A.L.R.3d 904 (1965).

The Fifth Circuit view is that expressed in *Northside Iron & Metal Co., Inc. v. Dobson and Johnson, Inc., supra*, which reasoned that the commission of a tort (in that case fraud and deceit) was "an insufficient basis for inferring waiver of the venue privilege." 480 F.2d at 800. The Court said:

> "While it is undoubtedly true, as appellants point out, that technological advances in transportation and communication in the past century have reduced the potential hardship to a bank of defending a lawsuit in a foreign district, we cannot say that such distant litigation would not normally entail some inconvenience for the bank and disruption of its business, or that the special treatment accorded national banks has no rational basis. If the venue statute is to be amended or repealed, Congress is the body which must act to do so and the body to which appellants' argument should be addressed."

Id.

In the only federal cases found in which *Reaves v. Bank of America, supra*, has been cited and reported to the date of this writing, the Courts have either expressed no opinion as to the case [*see Bechtel v. Liberty Nat'l Bank*, 534 F.2d 1335, 1340 (9th Cir. 1976); *Anthony v. Drovers Nat'l Bank*, 405 F. Supp. 626 (D. S.C. 1975)] or have criticized it, saying, "However, in the absence of more persuasive authority than *Reaves v. Bank of America, supra*, I hesitate

to base a finding of waiver on NBNA's 'full service' banking in the Southern District." *Odette v. Shearson, Hammil & Co., Inc.*, 394 F. Supp. 946, 951 (D. N.Y. 1975). That Court also refused to base waiver on a party's failure to raise a venue defense in *prior* litigation, saying that the "only authority supporting this proposition is *Reaves v. Bank of America, supra*"; that, in the ordinary case, the issue is "whether failure to make a timely objection to venue during a *particular* litigation waived the defense *as to that litigation*" (Emphasis by Court); and that there was no authority beyond *Reaves* to base waiver on the commission of a tort. *Id.*

Neither in Petitioner's Controverting Plea nor in any other pleading before the Trial Court was any question of waiver raised. There was no issue before the Trial Court in this regard. Petitioner relied solely on the provisions of article 1995 which he deemed applicable. Therefore, there was no question of waiver of 12 U.S.C. §94 before the Court of Civil Appeals.

2. Mandatory Venue of Actions Involving Trusts and Trustees Was Also Present in this Case as a Matter of Law. The Texas Trust Act provides a mandatory state law venue provision falling within article 1995, subdivision 30. Article 7425b, §24 provides as follows:

> "A. The district court *shall have original jurisdiction* to construe the provisions of any trust instrument; to determine the law applicable thereto; the powers, responsibilities, duties, and liability of trustee; the existence or non-existence of facts affecting the administration of the trust

estate; to require accounting by trustee; and to surcharge trustee.

B. In cases where there be a single trustee, the *venue of such actions shall be in the county of the residence of such trustee*; or if a corporation, in the county of its principal place of business. Where there are two or more trustees, then the venue shall be in the county where the principal office of the trust is maintained." *(Emphasis added).*

In determining the nature of the suit (a venue fact under this exception), "the petition is the best and sufficient evidence of the 'principal right asserted and the relief sought for the breach thereof.'" 1 R. McDonald, *Texas Civil Practice* §4.55-(IV) (1965 Rev.) (hereinafter referred to as *"McDonald")*, citing *Gilbert v. Gilbert*, 195 S.W.2d 936 (Tex. Sup. 1946). Petitioner's Petition for Declaratory Judgment falls squarely within the mandatory provisions. Petitioner alleged that the leases, sales and purchases described therein are proscribed by section 352 of the Texas Probate Code and should be cancelled and declared void and that costs of sales, court costs and attorneys fees be recovered from all Defendants. Petitioner's Controverting Plea, interpreting his Petition, states that Petitioner seeks to recover for fraud and for a trespass (conversion) against all Defendants. These by necessity involve a determination of the "powers, responsibilities, duties and liability" of the Respondent Trustee and "the existence or non-existence of facts affecting the trust estate." The action also seeks, by necesity, an accounting and to surcharge the Respondent Trustee. It was undisputed that Respondent is the sole

Trustee under the Will of D. M. Cogdell. Therefore, mandatory venue of such an action lies in Tarrant County, Texas, the county of the principal place of business of the Respondent. *Shellberg v. Shellberg*, 428 S.W.2d 117 (Tex. Civ. App. — Fort Worth, 1968, writ dism'd).

The *Shellberg* case dealt with a declaratory judgment action seeking to determine, in part, whether the Trustee was authorized under the Texas Trust Act to take possession and control of money, personal property and land belonging to the Trust for the Trustee's own use and benefit without an accounting. *Id.* at 119. The Trial Court, in overruling the Trustee's plea of privilege to be sued in a county *other than* the residence of the Trustee, found that the principal office of the Trust was in Tarrant County, Texas and that the action sought, in part, "to determine the legality of the actions of the former trustee . . .; and seeks a ruling on the rights and duties of the trustees and the parties at interest; and to require an accounting by the former trustee . . ." *Id.* at 119-120. The Court of Civil Appeals affirmed the ruling of the Trial Court retaining venue under Article 7425b, §24.

The situation in the instant case is that in *Shellberg* except that the Respondent Trustee herein seeks the proper venue under the Texas Trust Act.

Respondent's reliance on article 7425b, §24 of the Texas Trust Act was fully stated in Respondent's Plea of Privilege, heretofore described. The legal nature of the Petitioner's Petition was a question of law for the Trial Court and no fact question was raised in

this regard. *See Shellberg v. Shellberg*, *supra*, at 120. Petitioner did not and does not contend that Respondent waived the venue privilege found in the Texas Trust Act.

The remaining venue facts were established by the pleadings and affidavit showing that Respondent is a national banking association having its principal and only place of business in Fort Worth, Tarrant County, Texas, and that Respondent is sole Trustee under the Will of D. M. Cogdell. *See Plea of Privilege*, R. 9; *Affidavit of Bruce Petty*, R. 40. These venue facts were not and are not contradicted by Petitioner, there was no issue of fact created thereby, and there was no question presented to the Court of Civil Appeals in this regard, either by the record or by Petitioner's Brief. Now, all Petitioner says is that the suit was not for construction of a Trust. (Petition 7). However, the Texas Trust Act does not restrict mandatory venue to such suits.

3. The Court of Civil Appeals Correctly Held That the Primary Purpose of the Suit Was Not to Recover Lands or Remove Encumbrances Therefrom. Petitioner says that his action was one to recover "land or damages thereto, or to remove encumbrances upon the title to land" falling within article 1995, subdivision 14, and was, therefore, an in rem action. There are many reasons why this argument should, and did, fail. Respondent will state only a few.

The character of a case with respect to the Texas venue statute must be determined, under Texas law, by the facts alleged in the petition and controverting

affidavit, the principal right asserted, and the relief sought. *Shellberg v. Shellberg*, *supra*, 428 S.W.2d at 120; 1 *McDonald*, *supra* at §4.22.2 (I). All allegations must be considered to determine the *principal* right asserted and the relief sought. The nature of the suit is a question of law for the Trial Court. *Olson v. B. W. Merchandise, Inc.*, 388 S.W.2d 737, 742 (Tex. Civ. App. — Austin 1967, no writ); *Shellberg v. Shellberg*, *supra*, at 120.

The Controverting Plea says that Petitioner relies on the following subdivisions of article 1995 providing for exceptions to the general venue statute:

(1) "Defendants executed a written contract with portions of the contract to be fulfilled in Scurry County." (Re: Subd. 5);

(2) "[A] suit against an executor . . . as such to establish a money demand against the estate . . ." (Re: Subd. 63;

(3) "Plaintiff has alleged fraud of the Defendants, jointly and severally. Plaintiff's cause of action against the Defendants is based in part on the commission of a fraud by the transactions in properties belonging to the estate . . . Plaintiff stated that Defendant, THE FORT WORTH NATIONAL BANK, TRUSTEE, committed such fraud in the County of Scurry, Texas, . . ." (Re: Subd. 7);

(4) "Plaintiff states that Defendants, jointly and severally, committed a trespass on Plaintiff's realty situated in the County of Scurry, Texas . . ." (Re: Subd. 9);

(5) "Suit for the recovery of personal property . . ." (Re: Subd. 10);

(6) "If the defendant has inherited an estate con-concerning which the suit is commenced . . ." (Re: Subd. 11);

(7) "Plaintiff's cause of action against Defendants . . . is for the recovery of realty located in the County of Scurry, Texas." (Re: Subd. 14);

(8) "Suits to revise the proceedings of the county court in matters of probate . . ." (Re: Subd. 18); and

(9) "Two or more defendants . . ." (Re: Subd. 29a).

Can it be said from such Controverting Plea that the *principal right* asserted is a present title to land and that the *principal relief* sought is the recovery of title or to clear title to land in Scurry County, Texas? The answer is plainly "NO" and the Court of Civil Appeals so held.

The same is true of the Petition. The only allegation in the Petition which could, by any stretch of the imagination, concern land in Scurry County, Texas, is that in Paragraph VIII pertaining to a sale by the Respondent of "the Cogdell Center properties in Scurry County, Texas." Paragraph III, while ostensibly concerning land in *Briscoe County*, actually concerns a settlement agreement allegedly resulting in a transfer of real property in *Briscoe County* to the Executors in their individual capacities. Paragraph IV concerns leases on lands in *Briscoe County*. All other pleadings pertain to transactions involving corporate stock and other personal property.

The Court in *Shellberg v. Shellberg*, *supra*, at 121,

considered an allegation that the ultimate purpose of the suit was one to recover land. The Court determined that the suit was to determine whether the Trustee was authorized to take possession of money, personalty and realty for his own benefit and for an accounting. This is strikingly similar to the case at hand. The Court stated that the action was in personam.

The real purpose of the suit is to determine whether the transactions were prohibited under the Texas Probate Code; to determine the authority of the Executors and the Respondent Trustee in such transactions; to declare such transactions void; and to recover on a money demand. The "primary, dominant and ultimate purpose" of the suit is not to recover lands or to remove encumbrances. *See Hunt Oil Company v. Jones*, 436 S.W.2d 186 (Tex. Civ. App. — Eastland 1968, writ dism'd) (action for damages filed in Dallas County which alleged Plaintiffs were owners of land in Henderson County; Supreme Court had earlier determined title and possession to be in Plaintiffs; Defendants, including a Trust, filed pleas of privilege to be sued in Henderson County; *held* "primary, dominant, and ultimate purpose" was not to recover land). Even if Petitioner sought recovery of land, such recovery would only be incidental to the main character of the suit; the real import is to determine whether any transactions were prohibited by the Texas Probate Code and therefore voidable. *See Morgan v. Box*, 449 S.W.2d 499, 505 (Tex. Civ. App. — Dallas 1969, no writ) (Plaintiff sought, among other things, an accounting and to recover land on behalf

of a corporation; after reviewing the pleadings, the Court held that the ultimate nature of the suit was not within the exception and that the inclusion of an action for the recovery of land does not change the character of the lawsuit). *See also Miller v. Matthews*, 176 S.W.2d 1011 (Tex. Civ. App. — Eastland 1944, no writ) (suit to set aside conveyance as being in fraud of creditors does not come within exception).

Furthermore, Petitioner does not allege, and does not seek, present title and possession of any land. "Suits for the recovery of land embrace actions wherein Plaintiff alleges a present title." 1 *McDonald, supra*, §4.22.3(a). To avail himself of the exception in subdivision 14 of article 1995, the claimant must aver a present legal or equitable title giving it the right to immediate possession. *Edgar v. Bartek*, 507 S.W.2d 831 (Tex. Civ. App. — Corpus Christi 1974, writ dism'd); *W. B. Johnson Drilling Co. v. Lacy*, 336 S.W.2d 230 (Tex. Civ. App. — Eastland 1960, no writ) (suit to recover value of converted oil and for rental value of interest in personal property used in producing oil and for fraud in purchase of interest in utinized lease); *O'Quinn v. Dunagan*, 227 S.W.2d 366 (Tex. Civ. App. — El Paso 1949, no writ) (suit for specific performance).

It is said that "[w]here the plaintiff has no present interest in the land and could not recover that interest at the present time, the location of the land does not determine the venue." 59 *Tex. Jur.2d Venue* §38. In the instant case, the land involved, if any, was that of the Trust. Any declaration that a conveyance was

void would simply return the land to the Trust. The Trust had legal title to the property with power to sell and the interest of Petitioner is not in the specific land itself but in the corpus of the Trust, whether it is land or proceeds from the sale of lands. In the instant case, Petitioner failed to allege any title to any real property, failed to describe any such lands in a manner sufficient to avail himself of the exception, and failed to allege that Petitioner was asserting any claim to any land. Therefore, Petitioner waived such exception, if any was available. *Gulf Plains Grain & Elev. Co. v. Flynn*, 430 S.W.2d 526, 529 (Tex. Civ. App. — Waco 1968, no writ) (failure to describe land); *Olson v. B. W. Merchandise, Inc., supra.*

Finally, where it is undisputed that the Respondent has parted with title before the action was filed, the action cannot be one for the recovery of land. *James v. Drye*, 320 S.W.2d 319 (Tex. Sup. 1959). Petitioner's pleadings showed that Respondent had parted with title to Trust estate property.

However, Petitioner now asserts that a conveyance, valid on its face, becomes automatically void ab initio by the filing of a complaint under Texas Probate Code §352; therefore, says Petitioner, because the conveyances were void, the Respondent could not have parted with title. This argument (besides being one which seeks review of a state statute on the grounds that it was erroneously construed by the state courts) does not comport with either the law or the holding of the Court of Civil Appeals. First, the Court of Civil Appeals held, with regard to article 1995, subdivision 14, that the primary, dominant and ultimate purpose of Petitioner's

suit was not the recovery of lands. This was a law question for the Trial Court to determine, and for the Court of Civil Appeals to review, from the pleadings. After reviewing the pleadings and so holding, the Court of Civil Appeals opinion goes on to say, in dicta, that, *assuming* Petitioner sought recovery of land, the pleadings show that Respondent had earlier parted with title. Second, a transaction falling within Texas Probate Code §352 is voidable, not void on the filing of a complaint. Hearing and proof are required. This is evident in the unambiguous language of the statute:

> "The *personal representative of an estate* shall not become *the purchaser*, directly or indirectly, of any property of the estate *sold by him, or by any co-representative* if one be acting. If any such purchase is made, any person interested in the estate may file *a written complaint* with the court *in which the proceedings are pending*, and upon service of citation upon the representative, *after hearing and proof*, such sale shall be by the court *declared void, and shall be set aside by the court* and the property ordered to be reconveyed to the estate. All costs of the sale, protest, and suit, if found necessary, shall be adjudged against the representative."

Tex. Prob. C. §352 (Emphasis added). Petitioner cites *7-Up Bottling Co. of Austin, Inc. v. Capitol Nat'l Bank*, 505 S.W.2d 624 (Tex. Civ. App. — Austin 1974, writ ref'd n.r.e.), in support of his position that the conveyances pleaded by him were void ab initio apparently simply by his calling them void. The Court in the *7-Up Bottling Co.* case had before it a personal

representative (a co-executor) who was also an officer, director and stockholder in a corporation which had an option to buy the decedent's stock in the corporation. The corporation exercised the option. The Court held this to be an indirect sale to the executor and stated, in 505 S.W.2d at 627:

> "Thus, under the declaration of the statute the written complaint filed by the legatees *with the corresponding service, hearing and proof, voided the transaction.*" (Emphasis added).

The only proof required in the *7-Up Bottling Co.* case was a purchase, directly or indirectly, of estate property while acting as a personal representative. *Id.* at 626. In the case at bar, there were no leadings of a "purchase" by a "personal representative" from himself or a "co-representative." Further, Petitioner states the estate proceedings were pending in the Scurry *County* Court, but Petitioner's action was filed in the District Court. As a matter of law, the transactions alleged as against Respondent in the instant case were not automatically void and, as a matter of law, the statute would not apply to Respondent as a Trustee. *Tex. Prob. C.* 3(aa).

In sum, the suit is not primarily one for the recovery of lands in Scurry County, Texas. Therefore, 12 U.S.C. §94 and article 7425, §24 control as held by the Court of Civil Appeals.

CONCLUSION

In conclusion, Respondent submits that the application of Petitioner for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned member of the Bar of the Supreme Court of the United States and attorney for Respondent The Fort Worth National Bank, Trustee, do certify that three true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari have, this 19th day of January, 1977, been mailed to Gloria T. Svanas, P. O. Box 2415, Midland, Texas 79701, attorney of record for Petitioner, by United States certified mail, return receipt requested, in a postage prepaid envelope directed to such person at the address stated, and that, on such date, two copies of such Brief have been mailed to the Court of Civil Appeals for the Eleventh Supreme Judicial District of Texas at Eastland, Texas.

_____
Robert M. Randolph